No. 16,671

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE NAVAL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291. On September 30, 1959, an indictment in three counts was returned by the Grand Jury of the Northern District of California, Southern Division, charging the appellant with three violations of Title 21, Section 174. The appellant pleaded not guilty and demanded a jury trial. After the jury trial, in which appellant presented no evidence, he was convicted and sentenced to 5 years on each count, the sentences to run concurrently. A notice of appeal was thereafter filed.

STATEMENT OF FACTS.

Appellant's statement of facts is substantially correct. In short, Narcotic Agents of the Federal Treas-

ury Department on three occasions arranged to have an informant by the name of David Poggi searched. On each occasion no narcotics were found on Poggi's person and he was given certain amounts of money. He was then followed and watched while he spoke with the appellant in appellant's car. Immediately after each meeting Poggi returned to the Narcotic Agents where he surrendered a number of capsules which contained a whitish powder, subsequently established to contain heroin. Furthermore, Poggi no longer had the money on his person.

QUESTIONS PRESENTED.

1. Was the evidence sufficient to sustain the conviction?

2. Was reversible error committed in the denial of a Bill of Particulars?

3. Was reversible error committed in admitting certain evidence involving a telephone conversation?

4. Did the judge's instructions on circumstantial evidence constitute reversible error?

ARGUMENT.

I. THE PROSECUTION'S EVIDENCE WAS SUFFICIENT TO CONVICT.

At the outset it should be remembered, in reviewing this case, that this Court is not passing on

the question of whether the Government has proved to its satisfaction beyond a reasonable doubt the guilt of the appellant upon the three counts. The jury who heard the witnesses has determined that, and it is for this Court merely to decide whether there was sufficient evidence so that a reasonable jury could conclude as this jury did. The Government submits that the evidence here is ample to sustain that burden.

It is a well established principle that this Court will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to to the prosecution.

Henderson v. United States, 143 F. 2d 681 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A. 9th) certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th);

Bell v. United States, 185 F. 2d 302, 308 (C.A. 4th);

Gendelman v. United States, 191 F. 2d 993 (C.A. 9th);

Barcott v. United States, 169 F. 2d 929, 931 (C.A. 9th) certiorari denied 336 U.S. 912.

The proof in a criminal case need not exclude all possible doubt, but need go no further than reach that degree of probability where the general experience of

men suggests that it is past the mark of reasonable doubt.

Henderson v. United States, 143 F. 2d 681 (C. A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A. 9th) certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th).

The measure of reasonable doubt is generally said not to apply to specific detailed facts but only to the whole issue.

Wigmore on Evidence (3d ed. 1940), Vol. IX, Sec. 2497, p. 324.

An appellate Court is not concerned with the weight of the evidence. All questions of credibility are matters for determination by the jury.

Gage v. United States, 167 F. 2d 122, 124 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A. 9th) certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 254;

Gendelman v. United States, 191 F. 2d 993 (C. A. 9th);

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (C.A. 9th).

Certainly the Government's proof, although circumstantial, is most compelling. Poggi did not have nar-

cotics before he entered the car of the appellant and he did have narcotics after he emerged. Therefore, the inference is not only permissible, but inescapable, that Poggi got the narcotics from the appellant or from under his control. This evidence, especially unrebutted, not only supports a finding of guilty beyond a reasonable doubt, but compels it. See *Macaboy v. United States,* 160 F. 2d 279 (D.C. Cir. 1947); *Quong v. United States,* 160 F. 2d 251 (D.C. Cir. 1947); *Higgins v. United States,* 160 F. 2d 222 (D.C. Cir. 1947). See also *United States v. Pinna,* 229 F. 2d 216 (7th Cir. 1956); *Bunn v. United States,* 260 F. 2d 313; *United States v. Gernie,* 252 F. 2d 664 (2d Cir. 1958).

II. APPELLANT HAS WAIVED ANY POSSIBLE ERROR IN THE DENIAL OF HIS BILL OF PARTICULARS.

Even assuming that the judge would have abused his discretion in denying a properly made motion for a bill of particulars as to the identity of David Poggi, an examination of the transcript in the above case indicates that any error here was waived. Appellant's counsel below stated:

> ". . . [W]e are not entitled to the name of the informer provided he is going to be a witness. I think we are entitled to know that—if they are not going to call him as a witness. The cases show that we are entitled to his name." (Tr. vol. II, part I, pp. 2-3.)

Mr. Riordan, who, the record indicates, did not try this case, then stated, "I don't know who my witnesses

are," and nothing further was said by the appellant's attorney. If there were any error in the refusal of this information at that time, appellant has waived it first by stating that he was not entitled to the information unless the informant was not used as a witness, and secondly, by letting the matter drop without attempting either to force some type of an election from the Government or requiring one more familiar with the case to make a statement.

Furthermore, in the Government's opening statement delivered by Mr. Petrie (Tr. vol. 2, page 4) the name of the informer was given. At no time after this did appellant's counsel ask for a continuance in order to find the informant or to otherwise make any preparation to meet the testimony. In view of this, there is not the slightest hint of any prejudice from the denial of the requested information before trial.

III. THE TELEPHONE CONVERSATION COMPLAINED OF WAS ADMISSIBLE.

The telephone conversation complained of was admitted over appellant's objection that the voice of the appellant was improperly identified. First of all, there is evidence to support the identification of the voice as the appellant's. In the conversation Poggi stated that he was at his house and asked, "Would you honk when you come by?" The unidentified voice said, "Yes . . . I will be by in about 15 minutes." Approximately half an hour thereafter, (Tr. page 42) the appellant in his car appeared in front of Poggi's

house and honked its horn. This is sufficient identification to allow the conversation properly to be admitted since a reasonable, though circumstantial, inference from the foregoing was that the conversation was with appellant. Any other alternatives would go to the weight of the identification, not its admissibility. *Wach v. U. S.,* 212 F. 2d 520, 525 (8th Cir. 1954); *Morton v. U. S.,* 60 F. 2d 696 (7th Cir. 1932); *Ottida, et al. v. Harriman National Bank,* 24 N.Y.S. 2d 63 (1940).

Secondly, this conversation was admitted on the statement of Assistant United States Attorney Petrie that (Tr. vol. II, p. 38a) it would be connected up with the defendant. If it were not connected up with the defendant it would be subject to a motion to strike. The record, however, indicates that no such motion to strike was made at the end of the Government's case and therefore, any error in the admissibility of this evidence was waived.

Lastly, a reading of this conversation shows it to have been completely non-prejudicial. The only possible reference to narcotics in the conversation was, "Yes, how many" stated by the unidentified voice and Poggi's reply of "ten". On their face these words do not appear to refer to narcotics and if such a construction was placed upon them by the jury, another factor of identification of the unidentified voice would be present since the evidence showed that Poggi received ten capsules of heroin from the appellant.

IV. THE JUDGE'S INSTRUCTION WAS CORRECT.

Appellant's last claim of error is in the judge's instruction on circumstantial evidence. A reading of this instruction (pages 178-179) shows it is full, complete, and fair to the defendant. See *Holland v. United States,* 348 U.S. 121, 140. The judge stated, "Each fact essential to complete a chain of circumstances should be shown which is not only consistent with the guilt of the defendant," rather the guilt of the defendant on all of the evidence had to be established to the satisfaction of the jury beyond a reasonable doubt. Although the Court's idiomatic use of the word "only" for "merely" may not be commended by grammarians, there is no doubt that the jury could not have been misled by this to the appellant's detriment. As *Holland v. United States,* supra, indicates, this instruction was not only not reversible error but an extremely fair and perceptive instruction.

Dated, San Francisco, California,
March 10, 1960.

Respectfully submitted,

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